

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TIMOTHY P. KING)	
Claimant)	
VS.)	
)	Docket No. 268,971
EARTHGRAINS)	
Respondent)	
AND)	
)	
PACIFIC EMPLOYERS INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the September 16, 2002 Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on March 11, 2003.

APPEARANCES

Scott J. Mann of Hutchinson, Kansas, appeared for claimant. Douglas C. Hobbs of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. The record also includes a stipulation filed with the Division of Workers Compensation on September 12, 2002, which included a functional evaluation report and fringe benefit information.

ISSUES

Claimant worked for respondent for approximately 17 years as a mechanic. He alleges that on July 15, 2000, he fell while climbing down from a tractor, injuring his left knee. He also alleges that as he continued to work for respondent before leaving for left knee surgery in early January 2001, he sustained additional injury to the left knee and injured both the right knee and low back.

In the September 16, 2002 Award, Judge Clark determined claimant sustained a 40 percent work disability (a permanent partial general disability greater than the functional impairment rating). The Judge found claimant sustained a 14 percent whole person functional impairment, a 50 percent task loss and a 30 percent wage loss due to his work-related injuries. Furthermore, the Judge did not reduce the award for preexisting functional impairment under K.S.A. 44-501(c).

Respondent and its insurance carrier contend Judge Clark erred. They do not contest that claimant injured his left knee but they do dispute that he also injured his right knee and low back. They also argue the Judge failed to properly account for the preexisting impairment in claimant's knees and low back. Respondent and its insurance carrier request the Board to limit claimant's award to a five to seven and one-quarter percent permanent partial disability to the left lower extremity, after deducting for preexisting functional impairment. In the alternative, they argue claimant has a 30 percent wage loss and a zero percent task loss for a 15 percent work disability.

Conversely, claimant contends the Award should be affirmed. He argues respondent and its insurance carrier failed to prove the amount of claimant's preexisting functional impairment under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA Guides) and, therefore, the award should not be reduced. In the alternative, if any change is made to the Award, claimant contends the Board should modify the Award to determine that claimant had a 75 percent work disability from a 100 percent wage loss and a 50 percent task loss for the period from August 9, 2001, to November 18, 2001; a 44 percent work disability from a 38 percent wage loss and a 50 percent task loss for the period from November 18, 2001, to March 1, 2002; and a 42 percent work disability from a 35 percent wage loss and a 50 percent task loss for the period commencing March 1, 2002.

The only issues before the Board on this appeal are the nature and extent of claimant's injury and disability and the amount of functional impairment, if any, that should be deducted from claimant's permanent partial general disability rating due to preexisting functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes:

The Board affirms the Judge's findings that claimant injured his left knee on July 15, 2000, and that as a result of that injury claimant aggravated his right knee and low back. Likewise, the Board affirms the Judge's finding that due to the work-related injuries to both of claimant's knees and his low back that claimant has sustained a 14 percent whole body functional impairment according to the AMA Guides (4th ed.). That rating was derived by

averaging the 12 percent whole person functional impairment opinion provided by board-certified orthopedic surgeon Dr. C. Reiff Brown and the 16 percent whole person functional impairment rating provided by board-certified neurosurgeon Dr. Paul S. Stein.

Following the July 15, 2000 accident, claimant favored his left leg and developed increasingly severe right knee symptoms and low back problems. The greater weight of the medical evidence relates the increasing right knee and low back complaints to the extra stress that claimant was placing on those body parts due to his altered gait.

The Board is cognizant that Dr. Kenneth A. Jansson testified that claimant's right knee and low back complaints were not caused by the left knee injury and, further, that Dr. Bernard Poole testified that he found no evidence of injury over and above the preexisting osteoarthritis in claimant's right knee. But the Board concludes Drs. Jansson and Poole's testimonies are not persuasive as compared to the opinions of Drs. Brown and Stein. Moreover, board-certified orthopedic surgeon Dr. Terrance Tisdale testified that a limp, or an altered gait, will create injury in the opposite leg or the low back when you have a joint that is already partially damaged as was claimant's.

Claimant is overweight and before July 15, 2000, had widespread degenerative disc and facet joint disease in his low back and degenerative changes in both knees. In fact, claimant had undergone surgeries to both knees before the July 2000 accident. Nevertheless, claimant was able to perform his job duties for respondent as a fleet mechanic for approximately 17 years before the July 2000 accident.

Following left knee surgery in January 2001, claimant returned to work for respondent while still recuperating from that operation. The record is not entirely clear when claimant last worked for respondent but respondent could not accommodate his permanent injuries once he was given his final work release. Claimant was unemployed until approximately November 18, 2001, when he began selling cars on commission.

The parties stipulated that claimant's average weekly wage for the date of accident was \$804.47. In his new position selling cars, claimant earned \$600 during November 2001, \$1,500 in December 2001, \$2,050 in January 2002, \$3,222.25 in February 2002, \$2,553 in March 2002, \$1,663 in April 2002, \$1,793 in May 2002, and \$2,617.90 in June 2002. On March 1, 2002, claimant became eligible for fringe benefits from his new employer. When the record was closed, claimant was receiving fringe benefits consisting of life insurance and disability insurance that cost his new employer \$25.51 per week.

1. What is claimant's permanent partial general disability?

As indicated above, the Board affirms the Judge's finding that claimant injured both knees and his low back as a direct result of the July 15, 2000 accident. Accordingly,

claimant's permanent partial general disability is determined by the formula in K.S.A. 44-510e, which provides:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. **Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.** An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

But that statute must be read in light of *Foulk*¹ and *Copeland*.² In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wage being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work injury.

If a finding is made that a good faith effort has not been made, the factfinder [*sic*] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .³

¹ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

² *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

³ *Id.* at 320.

As the Kansas Court of Appeals recently held in *Watson*,⁴ the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker fails to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based on all the evidence, including expert testimony concerning the capacity to earn wages.

In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.⁵

Conversely, when a worker does make a good faith effort to find appropriate employment, the actual difference in the pre- and post-injury earnings is used to determine the worker's permanent partial general disability. And the Board concludes that claimant has made a good faith effort to retain and obtain appropriate employment.

Claimant remained in respondent's employ until approximately August 9, 2001. Claimant has not proven a wage loss for that period and, accordingly, his permanent partial general disability is limited to the functional impairment through August 9, 2001.

Claimant was unemployed until November 18, 2001; accordingly, the difference in his pre- and post-injury earnings up to that date is 100 percent.

On approximately November 18, 2001, claimant commenced selling cars, earning a total of \$15,999.15 through June 30, 2002. Dividing those earnings by the number of weeks represented by those earnings, the Board concludes claimant's post-injury average weekly wage for the period from November 18, 2001, through June 30, 2002, is \$499.97, excluding fringe benefits. Comparing claimant's pre-injury wage of \$804.47 per week to the post-injury wage of \$499.97 per week, the Board finds that claimant sustained a 38 percent wage loss for the period from November 18, 2001, to March 1, 2002.

As indicated above, on March 1, 2002, claimant became eligible for fringe benefits from his new employer. When the record closed, claimant was receiving fringe benefits having a value of \$25.51 per week. Accordingly, commencing March 1, 2002, claimant's post-injury wage increased to \$525.48 per week, which created a 35 percent wage loss when compared to the \$804.47 per week pre-injury wage.

⁴ *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

⁵ *Id.* at Syl. ¶ 4.

Finding the testimonies of Drs. Stein and Brown persuasive, the Judge determined that claimant had lost the ability to perform 50 percent of the work tasks that he performed in the 15-year period before the July 15, 2000 accident. The Board affirms that finding.

For the period through August 9, 2001, claimant has a 14 percent permanent partial general disability. Averaging the various wage loss percentages with the 50 percent task loss, claimant has a 75 percent permanent partial general disability for the period until November 18, 2001, followed by a 44 percent permanent partial general disability until March 1, 2002, followed by a 43 percent permanent partial general disability.

2. Should the award be reduced under K.S.A. 44-501(c) for the functional impairment in claimant's knees before the July 2000 accident?

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injury is an aggravation of a preexisting condition. The Act reads:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. **Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.**⁶

And functional impairment is defined by K.S.A. 44-510e, as follows:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body **as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides** to the Evaluation of Permanent Impairment, if the impairment is contained therein. (Emphasis added.)

Consequently, the Act requires that before an award may be reduced for a preexisting functional impairment, the worker must have a functional impairment that is ratable under the AMA *Guides* (4th ed.), if the impairment is contained in those *Guides*. Moreover, the Act requires that the amount of the functional impairment be established by competent medical evidence.

On the other hand, the Act does not require that the preexisting functional impairment was evaluated and provided a rating before the later work-related accident. Nor does the Act require that the worker had been given work restrictions for the preexisting condition before the later work-related accident. Nonetheless, the Act does

⁶ K.S.A. 44-501(c) (emphasis added).

require that the preexisting condition must have actually constituted a functional impairment.

The Kansas Court of Appeals has recognized that previous settlement agreements and previous functional impairment ratings are not necessarily determinative of a worker's functional impairment for purposes of the K.S.A. 44-501(c) reduction. In *Mattucci*,⁷ the Kansas Court of Appeals stated:

Hobby Lobby erroneously relies on *Baxter v. L.T. Walls Const. Co.*, 241 Kan. 588, 738 P.2d 445 (1987), and *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d 39, 611 P.2d 173 (1980), to support its position. In attempting to distinguish the facts of the present case, Hobby Lobby ignores that both *Baxter* and *Hampton* instruct that a previous disability rating should not affect the right to a subsequent award for permanent disability. *Baxter v. L.T. Walls Const. Co.*, 241 Kan. at 593; *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d at 41. Furthermore, the *Hampton [sic]* court declared that "settlement agreements regarding a claimant's percentage of disability control only the rights and liabilities of the parties at the time of that settlement. The rating for a prior disability does not establish the degree of disability at the time of the second injury." 241 Kan. at 593.

It is clear that claimant had functional impairment in his knees before the July 15, 2000 accident. The parties deposed Dr. Tisdale who treated claimant's knees in 1987 and 1988, performing surgeries on both knees. In October 1988, the doctor rated claimant as having a 15 percent functional impairment to the left leg and an 11 percent functional impairment to the right side. The doctor testified, in part:

Q. (Mr. Hobbs) All right. And was your opinion within a reasonable degree of probability that he had a 15 percent impairment to the left knee and an 11 percent impairment in the right knee?

A. (Dr. Tisdale) Back in about 1988 we were using one of the older edition books. And I don't know exactly where that came from, but I think they were diagnostic-related groups at that time. I think the 15 percent may have come from the reconstructed cruciate, plus the fact that we'd excised part of the meniscus. I think that's where the 15 percent comes from on the left. On the right, it would probably be range of motion, and there might have been some crepitus that played into that rating.⁸

⁷ *Mattucci v. Western Staff Services and Hobby Lobby Stores, Inc.*, Nos. 83,268 and 83,349 (Kansas Court of Appeals June 9, 2000).

⁸ Tisdale Depo. at 11.

But the parties did not ask the doctor to estimate what claimant's functional impairment would have been due to the bilateral surgeries that he performed on claimant in 1987 and 1988 considering the criteria set forth in the *AMA Guides* (4th ed.).

Although claimant had preexisting injuries and functional impairment in his knees for which he had received a workers compensation settlement, for purposes of K.S.A. 44-501(c) respondent and its insurance carrier have failed to prove the amount of functional impairment that existed before claimant's July 15, 2000 accident.

The burden of proving a workers compensation claimant's amount of preexisting impairment as a deduction from total impairment belongs to the employer and/or its carrier once the claimant has come forward with evidence of aggravation or acceleration of a preexisting condition.⁹

Consequently, the award should not be reduced for preexisting functional impairment under the provisions of K.S.A. 44-501(c).

The Board adopts the findings and conclusions set forth in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, the Board modifies the September 16, 2002 Award, as follows:

Timothy P. King is granted compensation from Earthgrains and its insurance carrier for a July 15, 2000 accident and resulting disability. Based upon an average weekly wage of \$804.47, Mr. King is entitled to receive 6.71 weeks of temporary total disability benefits at \$401 per week, or \$2,690.71.

For the period ending August 9, 2001, 49 weeks of benefits are due at \$401 per week, or \$19,649, for a 14 percent permanent partial general disability.

For the period from August 10, 2001, through November 17, 2001, 14.29 weeks of benefits are due at \$401 per week, or \$5,730.29, for a 75 percent permanent partial general disability.

For the period from November 18, 2001, through February 28, 2002, 14.71 weeks of benefits are due at \$401 per week, or \$5,898.71, for a 44 percent permanent partial general disability.

⁹ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, Syl. ¶ 5, 11 P.3d 1184 (2000), rev. denied 270 Kan. ____ (2001).

For the period commencing March 1, 2002, 100.45 weeks of benefits are due at \$401 per week, or \$40,280.45, for a 43 percent permanent partial general disability and a total award of \$74,249.16.

As of April 8, 2003, Mr. King is entitled to receive 6.71 weeks of temporary total disability compensation at \$401 per week in the sum of \$2,690.71, plus 135.71 weeks of permanent partial general disability compensation at \$401 per week in the sum of \$54,419.71, for a total due and owing of \$57,110.42, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$17,138.74 shall be paid at \$401 per week until paid or until further order of the Director.

The Board approves claimant's attorney fee contract insofar as it complies with K.S.A. 44-536.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of April 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Director, Division of Workers Compensation